

January 5, 2006

**VIA ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, S.W.  
Washington, DC 20554

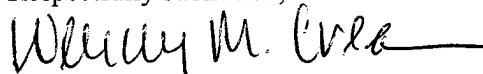
**Re: Notice of *Ex Parte* Meeting; CC Docket No. 02-6  
Hayes E-Government Resources, Inc. Request for Review of Decisions of the Universal  
Service Administrator**

Dear Secretary Dortch:

Pursuant to Section 1.1206 of the Federal Communications Commission's ("FCC" or "Commission") Rules, 47 C.F.R. § 1.1206, this letter provides notice that today, Tamar Finn and Wendy Creeden of Swidler Berlin LLP, counsel to Hayes E-Government Resources, Inc. ("Hayes"), met with Gina Spade, Warren Firschein and Dana Walton-Bradford of the Telecommunications Access Policy Division of the Wireline Competition Bureau, to discuss Hayes' above-referenced pending Request for Review of Decisions of the Universal Service Administrator ("E-Rate Appeal").

The issues in the attached presentation were discussed at the meeting. If you have any questions regarding this filing, please do not hesitate to contact the undersigned.

Respectfully submitted,



Tamar E. Finn  
Wendy M. Creeden

Counsel for Hayes E-Government Resources, Inc.

Enclosure

cc: Gina Spade (FCC)  
Warren Firschein (FCC)  
Dana Walton-Bradford (FCC)  
Karen Martinoff (Hayes)  
John Strobel (Hayes)  
Mallory Harrell (Hayes)



## **Hayes E-Government Resources**

### **E-Rate Appeal, CC Docket No. 02-6**

**FCC Meeting  
January 5, 2006**

# Background on Hayes

- Privately owned carrier headquartered in Tallahassee, Florida
- Provides telecommunications and Internet access services to mostly government clients
- Active participant in the E-rate program since 1999
  - Filed comments in various E-rate proceedings

# Timeline of E-Rate Appeal

- September 1999 ► FCC issues *Tennessee Order* setting forth legal standard for consideration of price as “a” primary factor in competitive bidding process
- November/December 2002 ► Florida Information Resource Network (FIRN) solicits bids for E-rate services to be provided to Florida school districts for the 2003-2004 Funding Year and selects Hayes as winning bidder for the services
- June 2003 ► SLD denies FIRN’s E-rate funding based on requirement that price be “the” primary factor, a standard that conflicted with *Tennessee Order*, which controlled at time of denial
- August 2003 ► Hayes timely files appeal with the SLD
- November 2003 ► SLD denies Hayes’ appeal based on same reasoning as the original funding denial
- December 2003 ► FCC issues *Ysleta Order* that adopts weighted category standard for demonstration that price is primary factor in competitive bidding process
- January 16, 2004 ► Hayes and the Florida Department of Education (DOE) timely file separate appeals with the FCC

# Legal Standard in *Tennessee Order*

- FCC found that because the procurement process considered price as “a” primary factor, the school was in compliance with the E-rate requirement that the school select the most cost-effective bid
  - Tennessee law required the school to consider, to the greatest practicable extent, cost in awarding contracts
  - Tennessee’s request for bids indicated that the contract would be awarded to the most cost-effective bidder
- FCC held that price was not the determinative factor in whether a bid was cost-effective
- FCC did not require that any type of “cost” category be weighted more than any other category.
  - School allocated 45 points to “Technical Approach” category as compared to 30 points to “Cost” Category (15 points less)

# FIRN Complied with *Tennessee Order*

- Similar to Tennessee law, Florida procurement law requires agencies to select the bidder that provides the “best value” (*i.e.*, cost-effective) to the state
- FIRN bid evaluators were instructed to “address each question” in the evaluation system “as it relates to price” and for each question, “focus on whether or not [ ] the offeror is providing the best solution to the state”
- At all times during the bid process, Hayes clearly understood the importance of the cost-effective/best value requirement

## FIRN Complied with *Tennessee Order* (cont'd)

- FIRN evaluation system awarded the highest number of points – 35 – to the category titled “Overall Project Concept, Design, and Cost” (“Cost Category”)
- Of the six components of the Cost Category, while only one specifically included “cost” in the description, the instructions required evaluators to evaluate each of the six components in the Cost Category “as it relates to price”
- The one component with “cost” specifically included in the description was weighted with 10 points
  - Unlike *Tennessee*, no other component of any other category was weighted more than 10 points
- Hayes received the highest score in the 10-point component with “cost” specifically included in the description

# SLD Violated Then Current Legal Standard in *Tennessee Order*

- At time FIRN selected Hayes as service provider and SLD reviewed the funding request, the *Tennessee Order* was the controlling legal standard
- Because FCC rules prohibit USAC from making policy, SLD was required to apply the *Tennessee Order* when evaluating FIRN's funding request
- In *Tennessee Order*, FCC held that if price is only "a" primary factor, the competitive bidding process still complies with the FCC rules by awarding the contract to the most cost-effective bidder
- The SLD applied a different standard to FIRN's funding request
  - Contrary to then-controlling FCC precedent, SLD required FIRN to weight the "cost" category more than any other category
- Although the FCC subsequently adopted this weighted category standard in its *Ysleta Order*, that decision was not issued until December 2003 – more than a year after FIRN had initiated its competitive bidding process and five months after SLD denied FIRN's funding request



# Retroactive Application of Legal Standard in *Ysleta* Order Impermissible

- FCC specifically stated that the policy changes established in *Ysleta* were “prospective” in nature
- Applicants like FIRN should not be expected to comply with policy changes before those policy changes are announced, particularly when the FCC has enunciated a policy to the contrary
  - Such a practice would not serve the public interest or the purposes of the E-rate program
- Retroactive application of the *Ysleta* weighting policy established more than a year after FIRN initiated its competitive bidding process would constitute an impermissible alteration to the past legal consequences of FIRN’s past actions in contravention of federal law

# Conclusion

- Hayes has demonstrated price was a primary factor used by FIRN in selecting Hayes as the winning bidder, meeting the legal standard set forth in the *Tennessee Order* that was in effect at the time the bidding process was conducted by FIRN and at the time SLD reviewed and denied FIRN's funding request
- FCC should grant Hayes' appeal and remand to SLD with instructions to grant FIRN's E-rate funding request for the 2003-2004 Funding Year